Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
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2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277

To: The Secretary

REPLY COMMENTS OF BENDBROADBAND

Bend Cable Communications, LLC d/b/a BendBroadband ("BendBroadband") submits these reply comments in the captioned proceeding. In response to comments filed by other parties, BendBroadband hereby provides the Commission with additional information and evidence supporting the adoption of rules that would strengthen the existing restrictions on television network duopolies and the imposition of appropriate local TV ownership rules. Specifically, as shown herein, the public interest would be served by rules expanding the prohibition on owning two of the top four-ranked stations to low power television ("LPTV") station ownership. Additionally, the Commission should consider a similar prohibition on common control of multicast broadcast streams of more than one of the "big four" networks on a single station license.

Introduction and Factual Background

BendBroadband is a small, locally-run, family-owned cable operator that has served central Oregon since 1955. The company now provides service to approximately 34,000 customers in its three franchised service areas in Deschutes County, covering the communities of Bend, Redmond, Sisters, Black Butte, Tumalo, and Terrebonne. This is a small market, ranked 197th in population out of the 210 markets measured by Nielsen.[1]

As a local family business, BendBroadband is part of the Central Oregon community that is concerned about and directly affected by broadcast television market consolidation that harms consumers, advertisers, and viewers. The current and prospective television broadcast landscape in Bend, Oregon is a bleak one for competition. As a cable operator, BendBroadband is adversely affected by the Commission's media ownership rules because of the leverage that monopolistic broadcasters are able to exercise in retransmission consent negotiations. These broadcasters are far more able and likely to make unreasonable retransmission consent demands that raise costs to cable operators and, ultimately, to cable customers, when they have increased negotiating leverage through consolidation. For this reason, BendBroadband supports comments submitted in this proceeding by Suddenlink[2] and argues that any consideration of how local TV ownership rules affect the public interest must take into account the economic threat posed to small market cable operators and their customers by top four-ranked television duopolies.

The only full-power analog commercial television station in the Bend market is an NBC affiliate (owned by NPG of Oregon). This company is attempting to acquire the local FOX

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[1] *2005 Television & Cable Factbook,* p. A-7 (Nielsen DMA TV Households Ranking).

[2] *See* Comments of Cequel Communications, LLC d/b/a Suddenlink Communications, *Review of the Commissions Broadcast Ownership Rules*, MB Docket No. 06-121, pp. 1-2 (filed October 23, 2006).

affiliate (an LPTV station) as well. BendBroadband understands that the NBC affiliate also plans to acquire another local LPTV station, KUBN-LP in Bend, which may affiliate with My Network TV. Additionally, NPG's NBC affiliate has begun multicasting the CW Television Network, and may launch Telemundo and a local news and weather channel on multicast streams in the near future. Accordingly, in the next round of retransmission consent negotiations this one company may control *six of the seven local commercial networks* in the Bend market.[3] If so, BendBroadband's ability to carry NBC could hinge on its agreement to carry six other local broadcast streams and potentially other cable programming networks affiliated with those major networks. BendBroadband has already experienced a host of peripheral demands made by NPG in the current round of retransmission consent negotiations for NBC that have been going on for several years, at an enormous cost to both parties. The most recent round of discussions began in earnest in June of 2005 and have *dragged on for eighteen months,* as NPG attempted to gain distribution for three multicast channels in addition to NBC – CW, Telemundo, and a local news and weather channel.

NPG's stations would account for virtually all of the television advertising revenue in the Bend market with the acquisition of the Bend FOX affiliate alone.[4] Under the DOJ / FTC horizontal merger guidelines relied on by the Commission in establishing media ownership rules, consolidation reaching a Herfindal-Hirschmann Index ("HHI") of over 1,800 is considered to be an unacceptable level of concentration. If the two network affiliates in Bend were consolidated under common ownership, the HHI concentration level in Bend, Oregon for analog television broadcasting would stand at virtually 10,000 – total market control by a single entity. The

[3] There is no CBS affiliate licensed to Bend and the local public broadcasting stations do not produce local content.

[4] A third Bend station, ABC affiliate KOHD, was launched in September of 2006, is only broadcasting in digital and therefore not receivable over-the-air to viewers without DTV reception, and does not yet have a reportable share of the advertising market.

Commission can prevent this kind of outrageous consolidation by applying its historical prohibition on ownership of two of the top four broadcast television stations to include LPTV stations[5] and multicasting. While these kinds of network combinations are permitted under current rules, the evolving anticompetitive situation in Bend could not possibly be the type of broadcast diversity envisioned by the Commission or the Third Circuit in their most recent reviews of broadcast ownership.

Argument

I. Network Duopolies Can and Should Continue to Be Barred Under Any Circumstances, Particularly in Small Markets

The Commission asked for comments concerning the continued need for ownership restrictions on the top four-ranked broadcast stations in a market and whether different limits should apply to small and large television markets.[6] BendBroadband believes that inclusion of LPTV stations in the local ownership limits would accomplish the Commission's objectives. Applying the top-four ownership restrictions to LPTV stations would address the problem in small markets, where LPTV stations are more likely to be among the top four rated stations in a market. Similarly, a rule that no more than one of the "big four" networks (ABC, CBS, NBC, and FOX) may be multicast under a single license would prevent the formation of harmful multicast network duopolies in smaller markets.

The Commission's recently remanded rules allowed common ownership of two full power stations in markets with 17 or fewer TV stations and three full power stations in markets

[5] Obviously, an LPTV station is much more likely to be one of the top four stations in a small market, but the bottom line is that there is no reason to exclude LPTV stations from this prohibition, since viewers are generally unaware whether they are watching a full or low power station. For the same reason that the Commission would not want one party owning or controlling two of the top four TV stations in a market, the power level of the stations should be irrelevant.

[6] *Review of the Commissions Broadcast Ownership Rules*, Further Notice of Proposed Rulemaking, FCC 06-93, ¶ 18 (rel. June 21, 2006) ("FNPRM").

with 18 or more, but in no case was an entity allowed to have more than two of the top four rated stations in a market. Intended to insure that HHI never exceeded the 1,800 standard for highly concentrated markets,[7] the numerical caps were vacated by the Third Circuit in *Prometheus* for not taking audience market share into account.[8] However, the top-four ranked station ownership restriction was left in place, with the court finding that the restriction was supported by record evidence.[9] The potential for consolidation in Bend shows that the only way the duopoly restriction can effectively be enforced in small markets is to include LPTV stations within that rule.

Certain broadcasters have argued that the public interest would be served by further relaxing the local ownership restrictions in small and mid-size markets.[10] However, the potential harm to the public interest resulting from consolidation in small markets outweighs any potential advantages from relaxing those restrictions. The Commission cannot ignore the increased costs to cable subscribers on the basic service tier, where broadcast stations are carried, that would result from dramatically increased retransmission costs brought on by further consolidation in these markets. As the Commission is aware, broadcasters have recently become considerably more aggressive in their demands for large cash payments in exchange for retransmission

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[7] FNPRM at ¶ 13, fn. 30 ("The HHI score of a market [meeting these restrictions] is below the DOJ/FTC merger Guidelines 1800 threshold for highly concentrated markets.").

[8] FNPRM at ¶ 16 (The Prometheus court "concluded that the rule was unreasonable because it would allow levels of concentration exceeding the 1800 HHI benchmark relied upon by the Commission in setting its numerical limits…")

[9] FNPRM at ¶ 15 ("The court also upheld the Commission's decision to retain the top four-ranked station restriction, stating that it 'must uphold an agency's line drawing decision when it is supported by evidence in the record.'").

[10] *See* Comments of Gray Television, Inc., *Review of the Commissions Broadcast Ownership Rules,* MB Docket No. 06-121, (filed October 23, 2006); Comments of Gannett Co. Inc., *Review of the Commissions Broadcast Ownership Rules,* MB Docket No. 06-121, (filed October 23, 2006); Comments of Granite Broadcasting Corporation, *Review of the Commissions Broadcast Ownership Rules,* MB Docket No. 06-121, (filed October 23, 2006).

consent.[11] Some have also become increasingly callous in their statements about how they view distributor access to their monopoly on network programming, shielded from competition by the Commission's non-duplication rules.[12] Even more ominously for BendBroadband, some broadcasters have boasted that their success in demanding cash windfalls for carriage will ultimately be at the expense of small cable operators, who lack sufficient market power to negotiate against the network affiliates.[13] As demonstrated by the situation in Bend, small cable operators and their subscribers will continue to suffer unless the Commission removes the historical LPTV exemption from the local ownership rules.

Finally, the policy rationale for the Commission's top four-ranked station prohibition, which was upheld by the Third Circuit,[14] should be applied to prohibit big four network consolidation under a multicast umbrella. Ownership or control of two of the top four networks in a single market via multicast streams would hurt local television *competition* – an acknowledged policy objective of the Commission's rules.[15] The harm to local competition from multicast transmission of major network programming is no different than the harm that results from ownership of two of the top four station licenses. BendBroadband supports the comments of other cable operators in this proceeding who point out that the ability to exercise retransmission consent negotiations for two of the top four networks in any market creates incentives for those broadcasters to exploit their statutory rights to prevent cable operators from

[11] *See* Emergency Retransmission Consent Complaint of Suddenlink, CSR-7038-C (filed Jul. 5, 2006).

[12] *Sinclair: No Binding Arbitration in Mediacom Retrans Fight*, MEDIAWEEK, January 11, 2007 (Refusing to submit to mediation, Sinclair characterizes the retransmission dispute with Mediacom as merely "a disagreement on price in a commercial negotiation"), available online at http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1003531856

[13] *CBS Getting Carriers to Pony Up*, TV WEEK, January 11, 2007 (CBS says that "additional [cash for carriage] deals with smaller operators could bring in $5 million a year") available online at http://www.tvweek.com/news.cms?newsId=11357

[14] *See* note 8, *supra*.

[15] FNPRM at ¶ 12 ("The Commission concluded, however, that restrictions on local television ownership were necessary to promote competition").

carrying their signals.[16] Considering the current dire situation in Bend Oregon, where a single entity could wind up controlling the local affiliates of NBC, FOX, The CW, My Network TV, and Telemundo through LPTV and multicasting without running afoul of the current local TV ownership rules, the Commission should act to prevent this highly anticompetitive situation from occurring.

II. Network Duopolies Harm Viewers and Cable Consumers Regardless of The Technical Source of the Broadcast Signals

Exempting LPTV from media ownership rules allows station owners in smaller markets to dodge the rationale behind the Commission's ownership rules and to reach results that would be unacceptable under the DOJ / FTC horizontal merger guidelines. Even if no entity in Bend owned more than one station, the Bend market has an HHI of over 5,000 counting the FOX and NBC affiliates as separately owned stations. That figure would jump to an HHI of close to 10,000 if the stations were commonly owned.[17] While either figure exceeds the DOJ / FTC horizontal merger guideline standards for highly concentrated markets of 1,800 HHI, the latter represents a far worse situation for consumers in Central Oregon. BendBroadband has opposed assignment of the FOX affiliate to NPG, arguing that the transaction is not in the public interest as it would allow NPG to exceed the Commission's consolidation benchmarks that measure concentration in the local advertising market.[18] In this proceeding, the FCC should consider the situation in Bend and adopt rules protecting cable consumers from greatly increased costs and preserve vibrant broadcast competition and diversity in local news media in small markets.

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[16] Comments of Cequel Communications, LLC d/b/a Suddenlink Communications, *Review of the Commissions Broadcast Ownership Rules*, MB Docket No. 06-121, p. 4 (filed October 23, 2006).

[17] *See* Petition to Deny of Bend Cable Communications, LLC, File No. BALTTL-20060817-ABZ, Exhibit 3 (filed September 21, 2006); *See* Opposition of Meredith Corporation, File No. BALTTL-20060817-ABZ, Exhibit A, *Analysis of the Market for Local Advertising in Bend, Oregon by Michael G. Bauman*, Exhibit 3, Pages 1 – 2 (filed October 25, 2006).

[18] Petition to Deny of Bend Cable Communications, LLC, File No. BALTTL-20060817-ABZ (filed September 21, 2006).

As Suddenlink argues in this docket[19] and as BendBroadband and other cable operators[20] explained in the annual assessment proceeding, duopolies of top four-ranked stations exercise broadcast leverage in retransmission negotiations that is exacerbated beyond the point of acceptability. The risk of retransmission consent leveraging becomes unimaginably worse where a single entity like NPG threatens to obtain complete control of the local broadcast market through a combination of multicasting and LPTV acquisition, all of which is permitted under current rules.[21] Certain public interest organizations have observed that the ability to multicast additional local networks on separate streams under a single broadcast license allows big network broadcasters to enjoy all the privileges of consolidation without the need to acquire multiple licenses.[22] In fact, if allowed to go unchecked, multicasting could create a huge loophole in the Commission's broadcast ownership rules whereby licensees could end-run the current prohibition on common ownership of two of the top four ranked stations.

Without rules addressing low power and multicast network consolidation, the potential for greatly increased broadcast market power will undoubtedly raise retransmission consent costs for small cable systems through "cash for carriage" arrangements, increasing cable operators' costs for providing the basic service tier of programming to customers. Those costs will necessarily be borne by basic service tier subscribers. As broadcasters continue to leverage their monopolistic retransmission consent powers to extract concessions from cable operators, they will only become more emboldened each year until large cash for carriage demands become

[19] *See* Comments of Cequel Communications, LLC d/b/a Suddenlink Communications, *Review of the Commissions Broadcast Ownership Rules*, MB Docket No. 06-121 (filed October 23, 2006).

[20] Comments of the Coalition for Retransmission Consent Reform, *Annual Assessment of the Status of Competition in the Market for the Delivery of Multichannel Video Programming,* MB Docket No. 06-189 (filed November 29, 2006).

[21] Comments of BendBroadband, *Annual Assessment of the Status of Competition in the Market for the Delivery of Multichannel Video Programming*, MB Docket No. 06-189, p. 2 (filed December 29, 2006).

[22] *See* Comments of The Office of Communications of the United Church of Christ, *et al.*, *Review of the Commissions Broadcast Ownership Rules*, MB Docket No. 06-121, p. 45-47 (filed October 23, 2006).

commonplace, as will be subscriber complaints about the resulting high cable rates and the decreasing quality of program choices.[23] The Commission should modify its prohibition on top-four station ownership to apply to LPTV and network multicasting. This will help preserve local broadcast competition in small markets and ensure that the retransmission consent process is not greedily abused beyond the modest purpose for which it was intended.

[23] *See* Comments of BendBroadband, *Annual Assessment of the Status of Competition in the Market for the Delivery of Multichannel Video Programming*, MB Docket No. 06-189 (filed December 29, 2006). The Commission could also neutralize the retransmission consent leveraging threat with rules requiring broadcasters to grant retransmission consent on a non-discriminatory basis to all cable operators. Such a policy could allow small cable operators to "opt in" to a retransmission consent agreement for stations on terms as favorable as given any other cable operator to a commonly owned or affiliated broadcast station.

Federal Communications Commission

The FCC Acknowledges Receipt of Comments From ...
Bend Cable Communications, LLC d/b/a BendBroadband
...and Thank You for Your Comments

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